

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Temporary
Immediate Suspension of the Family
Child Care License of Michelle
Sensibaugh

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Eric L. Lipman at 10:00 a.m. on February 13, 2008, at the Scott County Government Center, 200 Fourth Avenue West, Shakopee, MN 55379. The record closed at the conclusion of the hearing that day.

Jeanne Andersen, Assistant Scott County Attorney, appeared for the Department of Human Services (Department) and the Scott County Human Services Department (County). Michelle Sensibaugh, the Licensee, appeared on her own behalf without counsel.

STATEMENT OF THE ISSUE

Should the temporary immediate suspension of the family child care license remain in effect because there is reasonable cause to believe that there is an imminent risk of harm to the health, safety or rights of children in the license holder's care?

The Administrative Law Judge concludes the temporary immediate suspension should remain in effect pending a final decision by the Commissioner.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Michelle Sensibaugh is a licensed daycare provider. Ms. Sensibaugh has been providing daycare out of her home in Shakopee, Minnesota.

2. Sometime in early 2005, Ms. Sensibaugh began dating Joel Theis. Mr. Theis was married at the time but was in the process of getting a divorce.

3. In February of 2005, Mr. Theis's stepdaughter accused him of touching her in an inappropriate sexual manner on three specific occasions. According to the stepdaughter, the first incident of misconduct occurred when she was 14 years old.

4. In the course of investigating these allegations, the Scott County Sheriff's Department learned that a female cousin of Mr. Theis also alleged that Mr. Theis had nonconsensual sexual contact with her. On March 1, 2005, this cousin provided a taped statement to County investigators to the effect that approximately 20 years earlier, at a time when the cousin was a juvenile, Mr. Theis had touched her in ways that were inappropriate and unwelcome. The cousin advised County officials that she did not wish to pursue prosecution of the matter, but decided to come forward after she learned of the claims of Mr. Theis' stepdaughter.^[1]

5. On March 9, 2005, Mr. Theis was charged with three counts of felony criminal sexual conduct relating to acts with his stepdaughter.

6. On January 17, 2006, Mr. Theis entered an *Alford* plea to an amended count of gross misdemeanor fifth-degree criminal sexual conduct. Under an *Alford* plea,^[2] a defendant maintains his innocence, but admits that a jury could find him guilty based on the State's evidence. Prior to sentencing, however, Mr. Theis moved to withdraw this plea. The District Court denied the motion and the Court of Appeals affirmed the lower court's decision.

7. On or about April 10, 2006, Scott County received an anonymous message that Ms. Sensibaugh was dating a man named Joel Theis and that Mr. Theis had recently been charged with multiple counts of Criminal Sexual Conduct. The message also stated that Mr. Theis may be spending time at Ms. Sensibaugh's home during lunch time and in the afternoon when the children under care are picked up.^[3]

8. After receiving the anonymous message, Scott County Child Care Licensing Worker Laurie Wolf called Ms. Sensibaugh to discuss the substance of the anonymous message. During their telephone conversation, Ms. Sensibaugh admitted that she was dating Mr. Theis, but she stated that he is not at her home during daycare hours. Ms Sensibaugh also stated that Mr. Theis was not living at her home, and that she did not believe the allegations of criminal sexual conduct were true. Ms. Sensibaugh told Ms. Wolf that she could stop by her home anytime to verify that Mr. Theis was not at the home during her daycare hours.^[4]

9. On April 17, 2006, Ms. Sensibaugh signed and dated the following statement that was prepared by Ms. Wolf:

I agree that Joel Theis will not be in my home or on my property when there are any child care children present. If children are dropped off earlier than normal, I understand that Joel cannot be there. If I end up caring for child care children later than what my normal child care hours are, Joel will not be there until those children have left my home. I understand that Child Care Licensing will be doing monitoring visits to verify that Joel is not in the home. If it is determined that Joel has been in my home when child care children are present, I understand that Child Care Licensing will initiate a Negative Licensing Action which could include revoking my license.^[5]

10. On August 13, 2007, Ms. Wolf conducted a re-licensing visit at Ms. Sensibaugh's home. During this visit, Ms. Wolf reminded Ms. Sensibaugh that Mr. Theis could not be in the daycare residence if daycare children are present, and that Ms. Sensibaugh must notify licensing staff if Mr. Theis moves into the home. Ms. Sensibaugh told Ms. Wolf that Mr. Theis was not living in her home. At the bottom of the Drop In Visit form, Ms. Wolf wrote the following statement: "Joel Theis is not in the home during day care hours or when any day care child is present. Michelle will notify licensing if Joel moves in." Ms. Sensibaugh signed and dated the form above this statement.^[6]

11. On December 27, 2007, the Minnesota Supreme Court reversed the decision not to permit Mr. Theis to withdraw his plea. The Court determined that Mr. Theis's *Alford* plea lacked a sufficient factual basis and was not accurate. Accordingly, it remanded his criminal case back to the District Court for further proceedings.^[7]

12. On January 1, 2008, Ms. Sensibaugh married Mr. Theis.

13. Ms. Sensibaugh did not notify Ms. Wolf or other County licensing staff of her marriage to Mr. Theis, nor did she fill out a Background Study form for Mr. Theis.

14. Mr. Theis continues to own a separate home in Shakopee, Minnesota.^[8] Mr. Theis received mail at this address from at least mid-2005 through December 2007.^[9] Prior to 2005, Mr. Theis lived with his now former wife at a different address in Shakopee, Minnesota.^[10]

15. On January 11, 2008, Ms. Wolf received a voice mail message on her telephone answering machine to the effect that Ms. Sensibaugh had married Mr. Theis. Ms. Wolf went out to Ms. Sensibaugh's home that same day and inquired of the licensee as to whether she had married Mr. Theis. Ms. Sensibaugh confirmed that she had indeed married Mr. Theis on January 1, 2008.

16. On January 14, 2008, Scott County Child Care Licensing recommended to the Commissioner of Human Services that the Department temporarily immediately suspend Ms. Sensibaugh's child care license. The recommendation was based on: (1) Ms. Sensibaugh's marriage to Mr. Theis, who has three felony level criminal sexual conduct charges pending against him; (2) Ms. Sensibaugh's false reporting since April 2006 that Mr. Theis does not live with her in her home; and (3) Ms. Sensibaugh's failure to submit a Background Study on Mr. Theis.^[11]

17. On January 14, 2008, the Department issued an Order of Temporary Immediate Suspension.^[12]

18. On January 16, 2008, Ms. Sensibaugh requested a hearing on the temporary immediate suspension.

19. On January 18, 2008, the County requested the appointment of an Administrative Law Judge for a hearing on the temporary immediate suspension.

20. On January 23, 2008, the County issued a Notice of and Order for Hearing scheduling a hearing to take place on February 13, 2008.

CONCLUSIONS OF LAW

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07 (2a) (2006).

2. The Commissioner is required by statute to act immediately to temporarily suspend a license "if a license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program."^[13]

3. If a license holder appeals an order immediately suspending a license, the Commissioner shall request assignment of an administrative law judge within five working days of receipt of the license holder's timely appeal. A hearing must be conducted within 30 calendar days of the request for assignment. The commissioner shall issue a notice of hearing by certified mail or personal service at least ten working days before the hearing.^[14]

4. In scheduling the hearing, the Commissioner has complied with all procedural requirements of rule or law.

5. The scope of the hearing on an appeal of an Order for Temporary Immediate Suspension is limited solely to the issue of whether the order should remain in effect pending the commissioner's final order regarding a licensing

sanction. In such cases, the burden of proof is upon the Department to demonstrate that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals, pose an imminent risk of harm to the health, safety, or rights of persons served by the program.^[15]

6. Ms. Sensibaugh, as a family daycare licensee, is under a legal duty to prevent the abuse of minors from occurring within her facility, and to shield participants of her program from those who have committed disqualifying crimes.^[16]

7. The reported allegations of Mr. Theis's stepdaughter establish reasonable cause for the temporary immediate suspension of Ms. Sensibaugh's family child care license. The Department has demonstrated reasonable cause to believe that Mr. Theis, who now lives in and has access to the home where daycare services are provided, poses an imminent risk of harm to the health or safety of the children served by Ms. Sensibaugh's daycare.^[17]

8. If substantiated, the criminal sexual conduct alleged by Mr. Theis's stepdaughter would operate to permanently disqualify Mr. Theis.^[18]

9. The Department has demonstrated that reasonable cause exists to believe that the actions of the license holder or other individuals pose an imminent risk of harm to the health, safety, or rights of persons served by Ms. Sensibaugh's daycare program.

10. To the extent that the Memorandum that follows below includes matters that are more appropriately characterized as Conclusions, those items are incorporated herein by reference.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Human Services AFFIRM the temporary immediate suspension of Michelle Sensibaugh's family child care license.

Dated: February 28, 2008.

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally recorded (no transcript prepared)

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties shall have ten calendar days to submit exceptions to the administrative law judge's report. The record shall close at the end of the ten-day period for submission of exceptions. The commissioner's final order shall be issued within ten working days from the close of the record.^[19] The Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first-class mail pursuant to Minn. Stat. § 14.62 (1) (2006).

MEMORANDUM

The Department has the burden of establishing that there is reasonable cause to believe that the actions of the license holder or other individuals, or the license holder's failure to comply with applicable law or rule, poses an imminent risk of harm to the health, safety, or rights of persons served by the program. This is a modest standard, intended to ensure that vulnerable children are protected until there can be a full hearing and final determination of any possible licensing sanction under Minn. Stat. § 245A.08.^[20]

Where the parties diverge is whether Ms. Sensibaugh was under an obligation to disclose to County officials: (1) Mr. Theis' frequent night-time stays, after daycare hours, at the daycare residence; or (2) at a point close to their January 1, 2008 wedding date, the fact that Sensibaugh and Theis had married.

From the County's perspective, as soon as Mr. Theis had spent 30 nights at the Sensibaugh home during a 12-month period, he was "living in the daycare residence," and was subject to the state's background check requirement.^[21] Further, the fact that Ms. Sensibaugh signed a statement to the effect that she would disclose to County officials if Mr. Theis "moves in," and then did not do so, signals to County officials the Licensee's lack of trustworthiness.

From Ms. Sensibaugh's perspective, because Mr. Theis maintained a separate home up until the time of their marriage, and is not present in the daycare residence during the hours in which the daycare is operated, she was in compliance with the applicable rules. At most, continues Ms. Sensibaugh, she should have proceeded more directly to prompt the background study on Mr. Theis during the ten days that followed their wedding; but that this nonconformity should not result in a suspension of her child care license.

While there are shortcomings in the County's legal position,^[22] on balance, it has the better of the two arguments. Important in this regard are the facts that County officials raised their concerns about Mr. Theis moving into the daycare residence well before the couple's marriage; the Licensee was aware of the charges made against Mr. Theis; the Licensee separately pledged in writing that she would advise the officials if he moved into the home; and Mr. Theis, however briefly, acknowledged that the state had sufficient evidence to convict him of Criminal Sexual Conduct in the Fifth Degree, as to a minor victim with whom Theis had shared a home. These "actions ... or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program" and combine to make the Temporary Immediate Suspension appropriate in this case.

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^[1] Exs. 9, 10 and 11.

^[2] *Compare, North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

^[3] Exs. 1 and 15.

^[4] Exs. 1 and 15.

^[5] Ex. 2.

^[6] Exs. 3, 4 and 15.

^[7] Exs. 9, 10, and 11; *State v. Theis*, 742 N.W.2d 643, 651 (Minn. 2007).

^[8] Ex. B.

^[9] Exs. B, C and D.

^[10] Exs. E – L; Testimony of Michelle Sensibaugh.

^[11] Ex. 15.

^[12] Ex. 16.

^[13] Minn. Stat. § 245A.07 (2) (2006).

^[14] Minn. Stat. § 245A.07 (2a) (a) (2006).

^[15] *Id.*

^[16] See, Minnesota Statutes §§ 245A.07, 245C.14, 245C.15, 245C.18 and 626.556 (2006).

^[17] *In the Matter of the Temporary Immediate Suspension of the License of Lori Brede to Provide Family Child Care*, OAH Docket No. 12-1800-16132-2, Slip op. at 5 (2004) (<http://www.oah.state.mn.us/aljBase/180016132.rt.smm.htm>) (the Administrative Law Judge in that case found that reports tendered by the alleged victims to Sheriff's deputies, regarding sexual misconduct by the licensee's husband, were sufficiently reliable to justify the Department's entry of an order temporarily suspending the licensee's family day care operation).

^[18] See, Minn. Stat. §§ 245A.04 (3d), 245C.15 (a) and 609.3451 (2006).

^[19] Minn. Stat. § 245A.07 (2a) (b) (2006).

^[20] The burden of proof in this proceeding is lower, for example, than the “preponderance of the evidence” standard that governs associated licensure sanction proceedings. *Compare*, Minn. Stat. § 245A.08 (3) (2006).

^[21] Minn. Stat. § 245C.03 (1) (a) (2) and (6) (2006).

^[22] Most problematic is the County’s construction of the term “living in the daycare residence,” for purposes of the background study requirement, as meaning persons who have spent 30 nights within a 12-month period in the home. *Compare*, Minn. R. 9502.0336 (6) (2007). While this standard is eminently sensible, it is not part of Part 9502 or any other regulatory guidance. *See*, Testimony of Laurie Wolf. Indeed, as far as Ms. Sensibaugh or any other licensed day care provider might know, this 30-day standard is a wholly secret, unpromulgated rule. *Id.* Similarly, while Minn. Stat. § 245C.04 (e) authorizes background studies on those who are “newly affiliated with a child care license holder” during the interval between license periods, it is not clear from the submissions in this case that the Licensee’s 11-day delay in notifying county officials of her marriage to Theis was untimely under this statute or the accompanying rules of Part 9502.